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No. 82-612

In the Supreme Court of the United States

OCTOBER TERM, 1982

LAZAR T. WRACSARICHT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' suit against the United States under the Federal Tort Claims Act was barred by the statute of limitations, because the administrative claims were filed more than two years after the government allegedly injured petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-38) is not reported. The order of the district court (Pet. App 39-43) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1982. The petition for a writ of certiorari was filed on October 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Lazar Wracsaricht[1] was born in Milwaukee, Wisconsin, on April 3, 1917 (Pet. App. 34). His parents

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[1]Petitioner Lazar Wracsaricht's wife and children were also plaintiffs below and are petitioners here, but their claims derive from his. Thus, the facts upon which this suit is based are described as they relate to petitioner Lazar Wracsaricht ("petitioner").

took him to Yugoslavia when he was four years old, and he lived there until 1972. In 1972, desiring to come to the United States for business reasons, petitioner sought a United States passport from the United States consul in Switzerland. Upon being informed that an investigation would be necessary, petitioner obtained a business visa and entered the United States on his Yugoslav passport on August 8, 1972 (Pet. App. 34-35).

Between 1972 and 1975, petitioner participated in several administrative proceedings before the Immigration and Naturalization Service in order to estabiish his United States citizenship and thereby enable himself to remain in this country and to bring his non-citizen wife and children here to live. After these efforts proved both time consuming and unsuccessful, petitioner filed suit in federal district court, seeking a declaration of citizenship. The district court ruled for petitioner in 1975 and that judgment was affirmed by the court of appeals in 1977. *United States* v. *Wracsaricht*, No. 76-1868 (9th Cir. Nov. 11, 1977) (Pet. App. 35).

In 1979, pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, petitioner obtained access to files regarding his citizenship dispute that had been compiled by the INS and the Department of State. Those files allegedly indicated that the reason for the administrative delay was that Yugoslavia had made an extradition request for petitioner and that petitioner "had been the subject of a potential trade for an American skyjacker held by the Yugoslav government" (Pet. App. 35). In order to pursue these negotiations, the State Department allegedly had persuaded the INS to postpone deciding petitioner's citizenship status (*ibid*).

During 1979, petitioner and his family filed administrative claims against the United States with the Departments of Justice and State, seeking recovery for injuries attributable to the unreasonably protracted administrative proceedings involving petitioner's request for a passport (Pet. App. 35, 41). The claims were denied in November 1979.

2. In May 1980, petitioners filed this action in the United States District Court for the Western District of Washington, seeking damages against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, and from various governmental agencies and employees[2] under the Civil Rights Acts, 42 U.S.C. (& Supp. IV) 1983, 1985(3) and 1988, and under the Fourth and Fifth Amendments to the Constitution.

The district court dismissed the civil rights claims for failure to state a claim upon which relief can be granted, and it dismissed the tort claims for failure to submit timely administrative claims (Pet. App. 39-43). With regard to the latter holding, the court concluded that petitioners' claims accrued in 1975 when petitioner's citizenship was finally decided by the district court and that petitioners had "not

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[2]The complaint named as defendants, in addition to the United States, the Department of Justice and the Immigration and Naturalization Service, the Department of State and the following individuals: F. Ernest Ayers, Trial Attorney employed by the INS; Richard Ahern, District Director of INS in Seattle, Washington; David Ilchert, a Deputy Assistant Commissioner of INS; Edward Rudnick, Assistant Commissioner of INS; K. E. Malmberg, Assistant Legal Advisor for Management of Affairs of the Department of State; John P. Boyd, District Director of Seattle office of INS; Murray Stein, an employee of the Department of Justice; Donald J. Simon, Director of Foreign Affairs and Document Center, Department of State; D. L. McClaran, Acting District Director of INS Seattle office; L. F. Chapman, Jr., Commissioner of INS; Stuart Shelby, an employee of INS. Petitioner also sued the wives of the individual defendants, naming each wife as a "Jane Doe."

adequately explained why administrative claims were not filed until 1979" (*id.* at 42).

3. The court of appeals affirmed in an unpublished memorandum (Pet. App. 34-38). The court reasoned that since petitioners' claims accrued at the time of injury—when the State Department allegedly interfered with the passport application—the statute of limitations period expired in 1977. The court rejected petitioners' argument that the claim did not accrue until 1979 when they discovered the basis for their claim. It found that petitioners had failed to allege any facts to indicate that they could not have discovered the Department's involvement before the two-year limitations period of 28 U.S.C. 2401(b) had expired (Pet. App. 37).

ARGUMENT

Petitioners argue (Pet. 27-33) that the court of appeals erred by not deferring accrual of their cause of action under 28 U.S.C. 2401(b) until they "discovered" the cause of their injury and that the decision below conflicts with decisions of other courts that have applied the discovery rule to cases not involving medical malpractice claims. However, the decision of the court of appeals is a correct application of Section 2401(b) and is readily distinguishable from the cases relied upon by petitioners. Accordingly, review by this Court is unwarranted.

The pertinent statute of limitations provides that "[a] tort claim against the United States shall be forever barred" unless it is filed with the appropriate agency within two years after the claim "accrues." 28 U.S.C. 2401(b). As a general rule, "a tort claim accrues at the time of the plaintiff's injury." *United States* v. *Kubrick*, 444 U.S. 111, 119-120 (1979). Under that rule petitioners' administrative claims were clearly untimely since they were filed four years after the injury they suffered.

A limited departure from the general rule has been adopted by courts of appeals, almost exclusively in medical malpractice cases, where the injury is latent or the plaintiff is blamelessly ignorant of its cause.[3] In some such cases, a "discovery" rule has been applied under which a cause of action does not accrue until the plaintiff with reasonable diligence could have discovered the facts of both the injury and its cause. See *United States* v. *Kubrick*, *supra*, 444 U.S. at 120-121.

Petitioners argue (Pet. 32-33) that this case warrants review to resolve a conflict among the circuits with regard to whether this discovery rule has application to cases not involving medical malpractice claims. But this case is not a proper vehicle for resolving the alleged conflict because no court has ever applied the discovery rule to a case, such as this, where it is undisputed that the cause of injury was readily discoverable with reasonable effort at the time of the injury. The court of appeals correctly recognized that petitioners could have uncovered files disclosing the nature of the involvement of the Department of State without undue effort. The relevant files were available and accessible to petitioners as early as 1975, if they had requested them. Petitioners make no allegation that the government deliberately withheld or concealed the information regarding its involvement in the case; they simply chose not to make any inquiries until four years after the administrative entanglement had ended. Preoccupation with family matters, which is the only explanation offered for petitioners' delay (Pet. 30), is, no excuse for failing to take any action within the period of the statute of limitations to protect their rights.

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[3]See, *e.g.*, *Quinton* v. *United States*, 304 F.2d 234 (5th Cir. 1962); *Hungerford* v. *United States*, 307 F.2d 99 (9th Cir. 1962); *Toal* v. *United States*, 438 F.2d 222 (2d Cir. 1971).

It is the unexcused lack of diligence that distinguishes this case from those cited by petitioners. In *Stoleson* v. *United States*, 629 F.2d 1265 (7th Cir. 1980), the court held that Section 2401(b) did not bar a suit by a plaintiff who through reasonable diligence had been unable to discover the cause of her injury, because medical science had not advanced enough to uncover the connection between her heart condition and exposure to nitroglycerin. Petitioners made no comparable effort to uncover the cause of their injury.

In *Liuzzo* v. *United States*, 485 F. Supp. 1274 (E.D. Mich. 1980), the district court ruled that the accrual of a claim should be deferred by plaintiffs' ignorance of the government's possible involvement in their mother's death because of claimed efforts at concealment by the government. See also *Barrett* v. *United States*, 689 F.2d 324, 330 (2nd Cir. 1982). No such claim is made here, nor would such a claim be credible in light of the ease with which petitioners discovered the available evidence as soon as they attempted to obtain it. Thus, even assuming that these cases extending the discovery rule beyond medical malpractice claims were correctly decided, they do not advance petitioners' argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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